

## **TITLE 18. BOARD OF EQUALIZATION**

### **The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1598.1, *Diesel Fuel Prepayment Exemption***

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1598.1, *Diesel Fuel Prepayment Exemption*. The proposed amendments will delete the third paragraph in Regulation 1598.1, subdivision (a)(4), so the definition of diesel fuel in the regulation is consistent with the current provisions of RTC section 60022, and revise Regulation 1598.1, subdivision (b), so that it provides the same general guidance about how to calculate the percentage referred to in subdivision (b)(4) of the regulation, but without referring to amounts entered on specific lines of sales and use tax returns. The amendments also replace the capital “A” with a lower case “a” at the beginning of the word “Article” in the appendix to Regulation 1598.1.

#### **PUBLIC HEARING**

The Board will conduct a meeting in Room 207 at 5901 Green Valley Circle, Culver City, California on February 24-26, 2015. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on February 24, 25, or 26, 2015. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1598.1.

#### **AUTHORITY**

RTC section 7051

#### **REFERENCE**

RTC sections 6357.1, 6480, 6480.1, 6480.3

#### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

Summary of Existing Laws and Regulations

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC, § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC, §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers if their contracts of sale so provide. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § 1700, subd. (a)(1).)

RTC section 6480.1 provides, in part, that at any time the diesel fuel tax is imposed or would be imposed on any removal, entry, or sale in this state of diesel fuel, the supplier shall collect prepayment of retail sales tax from the person to whom the diesel fuel is sold. For purposes of the imposition of the prepayment of sales tax on diesel fuel, RTC section 6480, subdivision (c), provides that the term "diesel fuel" is defined pursuant to the Diesel Fuel Tax Law (commencing with RTC section 60001). In addition, RTC section 6480.9 provides an exemption from the sales tax prepayment requirement on certain sales of diesel fuel for agricultural purposes, and requires a person purchasing diesel fuel that is exempt from the sales tax prepayment requirements to issue an exemption certificate to the seller in accordance with any instructions or regulations prescribed by the Board.

The Board adopted Regulation 1598.1 in 2003. Regulation 1598.1 specifies the conditions under which the exemption provided in RTC section 6480.9 applies to the prepayment of sales tax on diesel fuel. Regulation 1598.1 also prescribes the exemption certificate required by RTC section 6480.9 and the appendix to Regulation 1598.1 contains an exemption certificate form, which may be used to claim the diesel fuel prepayment exemption.

In 2003, RTC section 60022, subdivision (c), expressly provided that "'Diesel fuel' does not include the water in a diesel fuel and water emulsion of two immiscible liquids of diesel fuel and water, which emulsion contains an additive that causes the water droplets to remain suspended within the diesel fuel, provided the diesel fuel emulsion meets standards set by the California Air Resources Board." Subdivision (a)(4) of Regulation 1598.1 refers to RTC section 6480, subdivision (c) and RTC section 60022, and incorporates the definition of diesel fuel from RTC section 60022 (2003), including the provisions of section 60022, subdivision (c). However, on January 1, 2007, RTC section 60022 (2003) was repealed and replaced by new section 60022, and new section 60022 does not contain the provisions that were formerly in subdivision (c) of section 60022 (2003).

Furthermore, subdivision (b) of Regulation 1598.1 lists a number of requirements that must be satisfied in order for the exemption provided in RTC section 6480.9 to apply to the prepayment of sales tax on diesel fuel sold to a retailer. As relevant here, subdivision (b)(4) of the regulation requires that "[d]uring the calendar year immediately preceding any purchases of diesel fuel, [the retailer] sold diesel fuel to diesel fuel consumers in which the gross receipts from such sales exceeded 25 percent of that retailer's total taxable sales." The last paragraph of subdivision (b) provides guidance about how to calculate the percentage referred to in subdivision (b)(4), and the guidance refers to

amounts entered on specific lines of sales and use tax returns. However, when a taxpayer files its return via the Board's online services, specific line numbers are not included.

### Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1598.1

As a result of the January 1, 2007, repeal of the provisions formerly in RTC section 60022, subdivision (c), the definition of diesel fuel in Regulation 1598.1 is no longer consistent with the current provisions of RTC section 60022. Therefore, Board staff determined that it was necessary to amend Regulation 1598.1 so its definition of diesel fuel is based upon the current definition of the term diesel fuel contained in section 60022 of the Diesel Fuel Tax Law, as provided in RTC section 6480, subdivision (c).

### *Interested Parties Process*

The Board's Business Taxes Committee (BTC) staff prepared draft amendments deleting the third paragraph from the definition of diesel fuel in subdivision (a)(4) of Regulation 1598.1. BTC staff subsequently prepared a discussion paper, and provided the discussion paper and its draft amendments to Regulation 1598.1 to the interested parties. On July 15, 2014, BTC staff conducted an interested parties meeting to discuss the draft amendments.

Since BTC staff did not receive any inquiries or written comments regarding its draft amendments during or subsequent to the July 15, 2014, interested parties meeting and staff had no changes to its recommendation to amend Regulation 1598.1, BTC staff did not prepare a second discussion paper and cancelled the second interested parties meeting that was previously scheduled to discuss staff's draft amendments. Staff also notified interested parties that comments could be submitted up to September 25, 2014, for consideration in the preparation of the Formal Issue Paper regarding the draft amendments. However, staff did not receive any other comments.

### *November 19, 2014 BTC Meeting*

Subsequently, staff prepared Formal Issue Paper 14-009 and distributed it to the Board Members for consideration at the Board's November 19, 2014, BTC meeting. Formal Issue Paper 14-009 recommended that the Board approved and authorize publication of the amendments to Regulation 1598.1 (discussed above) to delete the third paragraph in Regulation 1598.1, subdivision (a)(4), so the regulation's definition of diesel fuel is consistent with the operative provisions of RTC section 60022. Formal Issue Paper 14-009 recommended that the Board revise the last paragraph in Regulation 1598.1, subdivision (b), so that it provides the same general guidance about how to calculate the percentage referred to in subdivision (b)(4) of the regulation, but without referring to amounts entered on specific lines of sales and use tax returns. Formal Issue Paper 14-009 also recommended that the Board replace the capital "A" with a lower case "a" at the beginning of the word "Article" in the appendix to Regulation 1598.1 to make the word

consistent with the reference to “article” in subdivision (d)(1) of the regulation and consistent with the citation format prescribed in the California Style Manual.

During the November 19, 2014, meeting, the Board Members unanimously voted to propose the amendments to Regulation 1598.1 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1598.1 are necessary to have the effect and accomplish the objective of ensuring that the definition of diesel fuel in the regulation is consistent with the current definition of diesel fuel in the Diesel Fuel Tax Law, and ensuring that the regulation provides clear guidance to all taxpayers, including taxpayers who file returns via the Board’s online services, about how to calculate the percentage referred to in subdivision (b)(4) of the regulation.

The Board also anticipates that the proposed amendments to Regulation 1598.1 will reduce confusion, promote fairness, and benefit sellers, retailers, Board staff, and the Board by providing a definition for the term diesel fuel that is consistent with the applicable statutory definition, and providing clear guidance about how to calculate the percentage referred to in subdivision (b)(4) of the regulation.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1598.1 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1598.1 is the only state regulation providing an exemption from the prepayment of sales tax on diesel fuel. The Board is aware that California Code of Regulations, title 18, section (Regulation) 1533.2, *Diesel Fuel Used in Farming Activities and Food Processing*, also defines the term “diesel fuel” and the Board is separately proposing to amend the definition for the term diesel fuel in Regulation 1533.2 so that it consistent with the current definition of the term diesel fuel in RTC section 60022 and the proposed amendments to the definition of the term diesel fuel in Regulation 1598.1. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1598.1 or the proposed amendments to Regulation 1598.1.

#### NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1598.1 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

#### NO COST OR SAVINGS TO ANY STATE AGENCY, LOCAL AGENCY, OR SCHOOL DISTRICT

The Board has determined that the adoption of the proposed amendments to Regulation 1598.1 will result in no direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, no

other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

#### **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1598.1 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1598.1 may affect small business.

#### **NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

#### **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has determined that the proposed amendments to Regulation 1598.1 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1598.1 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1598.1 will not affect the benefits of Regulation 1598.1 to the health and welfare of California residents, worker safety, or the state's environment.

#### **NO SIGNIFICANT EFFECT ON HOUSING COSTS**

The adoption of the proposed amendments to Regulation 1598.1 will not have a significant effect on housing costs.

#### **DETERMINATION REGARDING ALTERNATIVES**

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to

affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

## CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Kevin B. Smith, Tax Counsel III, by telephone at (916) 323-3152, by e-mail at [Kevin.Smith@boe.ca.gov](mailto:Kevin.Smith@boe.ca.gov), or by mail at State Board of Equalization, Attn: Kevin B. Smith, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

## WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on February 24, 2015, , or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1598.1 during the February 24-26, 2015, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1598.1. The Board will only consider written comments received by that time.

## AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1598.1 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1598.1, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

## SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1598.1 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

#### AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1598.1, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).